NSW Crest

Court of Criminal Appeal
Supreme Court
New South Wales

- Amendment notes

Medium Neutral Citation:
R v SKL; R v JY; R v XGL [2019] NSWCCA 43
Hearing dates:
18 February 2019
Decision date:
05 March 2019
Before:
Hoeben CJ at CL at [1];
Adamson J at [2];
Button J at [90]
Decision:

(1) Appeal allowed.

(2) Quash the verdicts of acquittal.

(3) Order a new trial.

(4) List the matter for mention before the District Court on Friday 15 March 2019 at 9.30 am.

Catchwords:

CRIME – appeals – appeal against directed acquittal – elements of offence of dishonestly obtaining financial advantage by deception – cheating at Baccarat – dealer's communication of cards to be dealt to players – scope for circumstantial case – whether necessary to identify particular minds deceived – whether necessary to call individuals

Legislation Cited:

Casino Control Act 1992 (NSW), 87
Competition and Consumer Act 2010 (Cth), Sch 2, ss 18, 236

Crimes Act 1900 (NSW), ss 192B, 192E
Crimes Act 1958 (Vic), s 82
Crimes (Appeal and Review) Act 2001 (NSW), ss 107, 111
Criminal Procedure Act 1986 (NSW), ss 166, 168
Crimes (Sentencing Procedure) Act 1999 (NSW), s 58
Independent Commission Against Corruption Act 1988 (NSW)
Interpretation Act 1987 (NSW), s 21
Theft Act 1968 (UK), s 15
Trade Practices Act 1974 (Cth), ss 52, 82

Cases Cited:

Duncan v Independent Commission Against Corruption [2016] NSWCA 143
Flack v R [2011] NSWCCA 167
Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75
Hanave Pty Ltd v LFOT Pty Ltd [1999] FCA 357
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 39 FCR 546
In re London and Globe Finance Corporation Limited [1903] 1 Ch 728
Jones v Acfold Investments Pty Ltd (1985) 6 FCR 512
Macleod v The Queen (2003) 214 CLR 230; [2003] HCA 24
Moore v R [2016] NSWCCA 260; (2016) 262 A Crim R 590
National Commercial Banking Corporation of Australia Limited v Batty (1986) 160 CLR 251; [1986] HCA 21
Reg. v Lambie [1982] AC 449
R v Charles [1977] AC 177
R v Clarkson [1987] VR 962
R v Jenkins (2002) 6 VR 81; [2002] VSCA 224
R v Laverty (1970) 54 Cr. App. R 495
R v PL [2009] NSWCCA 256
R v Rozeik [1996] 1 WLR 159
R v Sullivan (1945) 30 Cr. App. R. 132

Texts Cited:

Archbold, Pleading Evidence and Practice in Criminal Cases (39th ed, 1976)

Category:
Principal judgment
Parties:
Regina
SKL (Respondent)
JY (Respondent)
XGL (Respondent)
Representation:
Counsel:
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File Number(s):

2016/226574; 2016/226378; 2016/226609
Decision under appeal
Court or tribunal:
Sydney District Court
Jurisdiction:
Criminal
Date of Decision:
19 September 2018
Before:
Whitford SC DCJ
File Number(s):
2016/226574; 2016/226378; 2016/226609

Judgment

1. **HOEBEN CJ at CL**: I agree with Adamson J and the orders which her Honour proposes.

2. **ADAMSON J**: The Crown appeals against an acquittal directed by Whitford SC DCJ on 19 September 2018 in respect of three accused, XGL, SKL and JY (the respondents), who were charged on indictment with counts which alleged that they dishonestly obtained a financial advantage by deception by cheating The Star Casino (the casino) contrary to s 192E(1)(b) of the *Crimes Act 1900* (NSW). All references in these reasons are to the *Crimes Act*, unless otherwise indicated. While XGL and SKL made separate submissions and JY adopted the submissions of XGL, the substance of most of the submissions was the same. In these circumstances, I propose to refer to the respondents' submissions generally without reference to individual respondents, except in relation to the discretion under ss 107(5) and 107(6) of the *Crimes (Appeal and Review) Act 2001* (NSW), as to which separate circumstances apply to XGL.

3. The trial judge, in substance, directed an acquittal on all counts because the Crown did not call any person to give evidence that he or she had been deceived by the respondents' conduct. His Honour's reasons will be addressed in detail below.

The grounds of appeal

4. The Director of Public Prosecutions (the DPP) appealed pursuant to s 107 of the *Crimes (Appeal and Review) Act*. As s 111(1)(b) of the *Crimes (Appeal and Review) Act* prohibits the publication of matters which may identify an acquitted person who is the respondent to such an appeal, the respondents will be referred to by pseudonyms only.

5. The DPP may appeal against a directed acquittal but only on a question of law alone: s 107(2) of the *Crimes (Appeal and Review) Act*. The grounds of appeal are:

"1. His Honour erred in holding that a 'deception' for the purposes of s 192E(1)(b) of the *Crimes Act* 1900 necessarily involves and requires, even in the case of a deception of an entity, proof that the deception operated on the mind of a natural person.

2. His Honour erred in finding that it was necessary, in order to establish the element of deception, for there to be evidence from some representative of the relevant entity as to having been deceived on its behalf."

6. The Crown has identified the following two questions of law said to arise from its grounds of appeal:

1. Is it an essential element in proving an offence under s 192E(1)(b) that the deception operate on the mind of a natural person; and

2. Did proof of the element of deception require direct evidence from some representative of the casino?

The relevant legislative provisions

7. Section 192B defines deception as follows:

192B Deception

(1) In this Part, ***deception*** means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person, or

(b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

(2) A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.

8. Section 192E(1) relevantly provides:

192E Fraud

(1) A person who, by any deception, dishonestly:

. . .

(b) obtains any financial advantage or causes any financial disadvantage,

is guilty of the offence of fraud.

Maximum penalty: Imprisonment for 10 years.

9. The principal issue for this appeal is whether, in the present case, where the alleged victim of an offence under s 192E(1)(b) is an entity, the Crown was obliged to identify a natural person or persons who was or were actually deceived or whether the offence can be proved by other means. All respondents accepted that it was not necessary for the Crown to lead evidence from actual persons to say that they were misled since they accepted that the deception could be proved inferentially.

The Crown case in the Court below

10. For the purposes of this appeal, it is necessary to examine the terms of the indictment, the opening and the evidence adduced by the Crown. It is also necessary to do so to address the respondents' submission that the Crown had conducted its appeal on a different basis from that on which it had conducted its case below.

The indictment

11. The wording of the counts 1-21 on the indictment is similar. Count 1, against XGL and SKL, charges that:

"On 17 July 2016 between 4.35am and 4.50am, at Pyrmont in the State of New South Wales, did, by deception, that is, by cheating at The Star Casino whilst [XGL] and [another person] were playing and [SKL] was dealing Premium Baccarat, dishonestly obtain a financial advantage, namely $132,500."

12. In each of counts 1-21, SKL is alleged to be dealing. For counts 1-12 and 19-21 XGL is alleged to be playing, either by himself or with another person who is not named as an accused. For counts 13-18, XGL and JY are alleged to be playing. In count 22, the three respondents are charged with participating in a criminal group under s 93T(1). It was accepted that if there was a verdict of not guilty on counts 1-21, there would have to be a verdict of not guilty in respect of count 22.

The Crown opening

13. In its opening, the Crown said (tr. 32.39-33.3):

"In this case there are 21 counts charging an offence of fraud. For these charges, the two elements the Crown must prove beyond a reasonable doubt are these; first, that the accused by deception and, second, dishonestly obtained any financial advantage. Now, the Crown contends that the financial advantage is the profit obtained from the winning wages as set out in each of the counts of fraud on the indictment.

The deception that the Crown alleges that the accused perpetrated was that in concert with one another, the dealer obtained information about forthcoming cards, he conveyed that information to the players to obtain significant wagering advantage, and thereby the accused cheated in a game that we've already spoken about being a game of chance. The Crown must prove beyond a reasonable doubt that the profit obtained from those winning wagers was the result of this intentional deceptive conduct and that the accused knew this conduct was dishonest."

14. It is unnecessary, for the purposes of this appeal, to describe the conduct alleged in the Crown case beyond the following short summary. SKL had been employed as a dealer at the casino. He was trained in the game of Premium Baccarat (baccarat), which is supposed to be a game of chance. The Crown case was that SKL would, at various times in the course of the game, ascertain the cards to be dealt and signal the identity of the cards to the relevant player, either by hand signals or by using his mobile phone. CCTV footage at the casino revealed that XGL, another player (C), and JY made substantially larger bets compared with their median bet when SKL used these signals or sent these messages.

The evidence of deception

15. The evidence of deception largely comprised the evidence of the key wagers made in games the subject of counts on the indictment, when compared with wagers made by the players on other games. The substantially higher bets made for such games were relied on by the Crown as evidence of cheating since they tended to indicate that the players were, understandably, prepared to bet considerably more when the risk of losing had been removed by the dealer's signals to them. The CCTV footage of the games was also tendered. It indicated that such signals as were made by the respondent dealer to the respondent players were so subtle and nuanced (though nonetheless clear to the participants) as not to be detected by the casino through its supervisors or otherwise.

16. Kevin Houlihan, the casino's group investigations manager, gave evidence that the casino employed supervisors who closely monitored the games as they were being played by watching them live and also viewing CCTV footage of games with a view to detecting any irregularities. His evidence was that a supervisor who notices a matter of concern will stop the game or call for a more senior person. Mr Houlihan said that the CCTV surveillance was conducted by hidden cameras. It was the Crown case that, where the alleged deception constituted concealment of the positive cheating engaged in by the respondents, as well as the concealment of the collusive arrangement between SKL as dealer and XGL and JY as players, the relevant supervisors must have been deceived as to the fact that the cheating was occurring. The Crown case was that the only reasonable inference was that the supervisors were deceived into believing that the game was being played in accordance with the rules.

17. The Crown contended that, in these circumstances, it would be of little or no utility to require the supervisors to be called because all that they could be expected to say was what was revealed by the

CCTV footage anyway, which was that the games continued because they detected nothing untoward. Moreover, given that, as far as the supervisors were concerned, there was nothing remarkable about the games the subject of the counts on the indictment, it would be highly unlikely that any of them would have any recollection of the relevant games. All that the supervisors would be likely to be able to say would be what Mr Houlihan actually said about the usual practice and the requirements and protocols of the casino. These forensic difficulties will be addressed in the authorities referred to below.

The applications for verdicts by direction

18. At the close of the Crown case, XGL and SKL applied for verdicts by direction in respect of all 22 counts. JY subsequently joined in the application. It was submitted on behalf of XGL (whose submissions were adopted by the other two respondents) that there were the following "three inextricably linked and independently fatal obstacles" to the Crown case on the s 192E(1)(b) counts:

1. the Crown had failed to identify the person or entity alleged to have been deceived;

2. the words or conduct said to identify the deception had neither been pleaded nor particularised; and

3. the Crown had not established the necessary causal connection between the alleged deception and any financial advantage.

19. The trial judge directed verdicts of acquittal on the basis of (1) above. As to (2), it is clear from the trial judge's reasons that his Honour was satisfied that the conduct relied upon had been sufficiently specified. As to (3) his Honour found that there was evidence which, taken at its highest, was capable of establishing the necessary causal connection between the alleged deception and any financial advantage. Accordingly, for the purposes of this appeal, only (1) needs be considered.

20. The respondents submitted to the trial judge that "[f]raud pursuant to s 192E is the dishonest deception **of another** to obtain property" (emphasis in original) in reliance on *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 (*Duncan*) at [352]-[353] and [355] (Bathurst CJ) and [502] (Beazley P); *Moore v R* [2016] NSWCCA 260 at [59]-[60] and [62] (N Adams J); (2016) 262 A Crim R 590, which will be addressed in detail below. The respondents contended that the Crown could not make out the charges without identifying, and calling evidence from, natural persons who were deceived.

The trial judge's reasons

21. The trial judge, in [6] of the reasons, summarised the evidence of the circumstances in which the respondents came to be in the casino. The following summary was not the subject of challenge:

"The subject of the offences charged is the game of Premium Baccarat, which is hosted at premises known as The Star Casino. The accused [SKL] was a table games dealer in the game of Premium Baccarat at the Casino. The accused [XGL] and [JY] were playing the game of Premium Baccarat on a junket program at the Casino (Chan junket in counts 1-8 and Feng junket in counts 9-21). A junket program is a program whereby for payment of a certain deposit and adherence to a variety of other conditions, particular identified customers of the casino are extended a variety of privileges and entitlements including such things as payment by the Casino of their accommodation and airfares and provision of private rooms and customer selected tables and dealers during the period of the junket program."

22. The game of baccarat, the deception and the Crown case were described by the trial judge, uncontroversially, as follows:

"[7] Premium Baccarat is a game of chance. It is dealt from a card shoe containing eight decks of 52 playing cards, which arrive in a pre-shuffled order and are dealt from a face-down position out of the card shoe.

[8] The first four cards are always dealt with the first card dealt to Player, the second card dealt to Banker, the third card dealt to Player, and the fourth card dealt to Banker. Additional cards may be drawn depending on the outcome of the first four cards.

[9] Wagers may be placed before any cards are dealt in a coup on one of three possible outcomes: the Banker hand, the Player hand or Tie. The hand that totals closest to nine wins the coup. There are also other secondary bets permitted; on Banker pairs and Player pairs.

[10] It is the Crown case that the accused, acting in a joint criminal enterprise, gained knowledge of forthcoming cards to predict with at least greater if not complete certainty the outcome in a particular coup. As a result, the Crown contends that the accused placed substantially larger wagers on those outcomes to obtain a financial advantage, being the profit from those wagers."

23. The trial judge summarised the evidence led in the Crown case and was satisfied that it was capable of supporting the conclusion that the respondents were cheating at the game of baccarat and that they had obtained a financial advantage by cheating, as follows:

"[54] Accepting the Crown case at its highest, there is in my view evidence

capable of supporting the following conclusions.

[55] First, that the accused dealer, [SKL], manipulated cards in a manner

successfully calculated to identify to him the suit and value of specific cards, nominated on the Crown case as the trigger and slug cards. Any such conclusion must arise by inference. There is not, contrary to the express assertion to this effect in the Crown submissions any evidence in which [SKL] 'can be seen to peek at the slug and trigger cards'.

[56] Second, that by knowing the value of whatever cards he saw and could remember, he knew, once the trigger cards were dealt, when and in what order the slug cards would appear and so could predict, with some unidentified degree of certainty what wager would win. The sorts of contingencies surrounding the degree of certainty include at least questions of how many cards he saw and recalled and when in the course of play the trigger cards appeared.

[57] Third, that he communicated to the other accused, directly or indirectly, by coded electronic message or by hand signals, either the values of the trigger and slug cards or the bet that should be placed.

[58] Fourth, that bets were placed by the accused players in accordance with the information communicated by the dealer.

[59] Fifth, that the bets placed consequent upon the communication were winning bets on every occasion.

[60] Sixth, that the bets corresponding to each of the counts was in its quantum significantly out of proportion to the quantum of bets otherwise placed by the accused players in the course of their participation in the various shoes in which the wagers the subject of the 21 counts were placed.

[61] From a combination of these conclusions, it seems to me the conclusion is reasonably available that the accused were cheating at the game of Baccarat. It is also reasonable to draw the conclusions, first, that that cheating conduct was dishonest according to the standards of ordinary people and, second, was known by the individual accused to be dishonest according to the standards of ordinary people. The conclusion is also reasonably available, indeed inevitable if the foregoing conclusions are accepted, that the relevant conduct was intentional (at least in the case of [XGL] and [SKL], [JY] is at least potentially in a different category in this respect).

[62] If, as it seems it must, deception relevantly requires a positive act, then I am satisfied that the cheating relied upon on the Crown case reasonably meets that requirement.

[63] I am also satisfied that it is reasonable to conclude that the winnings from each wager represented by the individual counts on the indictment relevantly constitute the obtaining of a financial advantage. I am also satisfied that there is a reasonable basis for concluding that there exists a causal connection between the dishonest, cheating conduct I have identified above and the obtaining of that financial advantage."

24. At [69], his Honour considered that the alleged cheating arguably met the definition of deception by conduct and that the deception was arguably practised on the casino. However, after reviewing the authorities at [70]ff, his Honour considered that he was required by authority to require the Crown to prove "that a relevant misrepresentation has in fact operated on the entity in a way that led to the gaining of the financial advantage": [96]. The reasoning (which is the basis for ground 1) underpinning this conclusion appears from [95]:

"I consider that I am compelled by the interpretation of the section in the decided cases, in particular as exposed most recently by the Court of Appeal in *Duncan*, to conclude that the Crown case taken at its highest does not establish a *'deception'* for the purposes of s 192E of the [*Crimes Act*] and, as a corollary, does not establish a deception that is causally connected with the obtaining of the alleged financial advantage."

25. The basis for ground 2 appears from the following extracts:

"[96] The cases seem to me to make plain, as the Chief Justice at least by extension implied in *Batty* in the passage earlier cited, that in proof of charges of this kind it is incumbent upon the Crown to prove that a relevant misrepresentation has in fact operated on the entity in a way that led to the gaining of the financial advantage.

[97] In the usual case, where one is dealing with the deception of an entity that will be established by evidence of how the alleged misrepresentation was operative upon the entity, or the person by whom the entity is for this purpose represented. As was submitted on behalf of the accused, in these matters, if it was the case, that the relevant person, the mind of the Star for these purposes, would or would not have taken a particular course, then there must be evidence to that effect in the Crown case.

[98] As was acknowledged in the submissions on behalf of [XGL], in some cases one can't expect there to be direct evidence of an individual, for example if significant time has passed and no one relevant is available.

[99] In this case there was no such evidence and nothing corresponding with bank records or similar which might stand as a reasonable substitute for such evidence, as appears to have been the position in some at least of the banking and similar cases referred to in argument. Further, there is no evidence establishing the unavailability otherwise of the sort of evidence that might reasonably be expected in proof of the deception alleged. It was submitted, not unreasonably in all the circumstances, that it can't be said that this is a complex matter where there cannot be evidence. There could have been evidence, but for whatever reason, none has been called.

[100] It is accepted on behalf of the accused that there are some cases where it is obvious that the only inference reasonably open is that particular words or conduct did operate in a particular way on whomever was the relevant mind of the entity allegedly deceived. Reference in this respect was made to *Lambie* and *Batty*, cases relied upon by the Crown, and it was submitted for the accused that in each of those cases there is clearly a person who is deceived by the conduct in question.

[101] But that is not this case in my assessment. The Crown seeks to characterise the conduct it relies upon as an implied representation which operated upon "the casino" so as to give rise in the relevant causal sense to the financial advantage represented by the profit on the relevant wagers. To so characterise the conduct seems to me to give at least implicit recognition to the requirements of deception as articulated in the cases, including for example in *Duncan*, and the passage from the judgment of Fagan J in *Moore* to which I earlier made reference. Without identifying the person or even class of persons to whom it was made or upon whom it operated, the Crown's articulation of its case in that way seems implicitly to accept, I think correctly, that deception as a matter of law requires the identification of a representation (by words or conduct) which, with the exception of the circumstances addressed in the extension of the definition by s 192B(1)(b),operates on the mind of a person so as to cause that person to act on a false perception of intentions or facts.

[102] **However, in the present case the cheating conduct relied upon by the Crown does not seem to me by its nature to be relevantly directed to, nor to operate upon, the mind or minds of anyone connected with the casino. Nor does it seem to me to operate on the mind of such a person in a way that then results in the obtaining of the financial advantage contended for by the Crown.** I accept, as I have earlier indicated, the conduct is cheating, it is also dishonest, but by limited analogy with the situation in *Moore*, it is not deception.

[103] Whether or not that is so may be a question of fact so articulated.

[104] However, in the case opened and presented, the Crown has simply not addressed this aspect of its case by evidence. That seems to me to be a failing as a matter of law. In that event there simply is not evidence capable of establishing the offence charged by each of counts 1 to 21. The case that has been run does not involve the identification of a person who has been deceived. The jury have never been told that what they ultimately have to consider is whether or not the impugned conduct led to presently unspecified and unidentified persons holding a particular state of mind or taking or refraining from taking some particular course of action. Nor is there any evidence led which permits them to do that. To say the conclusions flow as a matter of inference seems to me in all the circumstances to invite speculation and to proceed essentially on an assumption of that which it is the Crown's obligation to establish by evidence."

[Emphasis added.]

26. The trial judge concluded that the charge under s 192E(1)(b) was not applicable in the present case, which was covered by s 87(1)(a) of the *Casino Control Act 1992* (NSW), which prohibits cheating in a casino. Charges under s 87(1)(a) (obtain a benefit in casino by dishonest means) were included as back-up charges and were contained on a certificate pursuant to s 166 of the *Criminal Procedure Act 1986* (NSW).

Consideration

27. For the reasons that follow, I consider that each of the questions of law raised by the Crown (set out above) ought be answered in the negative. I am satisfied that both grounds of appeal have been made out. As the questions and the grounds are related and many of the authorities include a consideration of both questions, I propose to address the principles arising from the grounds and questions together to explain my conclusions.

Statutory construction of s 192E(1)(b)

28. The starting point is the wording of s 192E(1)(b), which criminalises dishonestly obtaining a financial advantage "by any deception". The section does not, in terms, require an identified person to be deceived, merely that the obtaining of the financial advantage be "by any deception" and that it be effected "dishonestly". However, as a matter of construction, the requirement that there be a financial advantage obtained "by any deception" tends to invite at least the following questions: "from whom is the financial advantage obtained?" and "who has been deceived?" While "cheating" and "deception" are often used synonymously, "cheating" is apt to apply to dishonest conduct generally, whereas "deception" more clearly implies both a subject (the deceiver) and an object (the deceived). In any prosecution under s 192E(1)(b), it can be expected that the Crown, as a matter of fairness, will answer those two questions. In the present case, as the Crown explained at trial and on appeal, the financial advantage is obtained first from the "banker", who has to "pay" on the winning bid by allocating chips to the value of the winnings and then from the casino itself which cashes chips at the end of the game.

29. In other games of chance and games of skill, it may be that there is also a deception of other players. However, that need not be considered in the present case since the "banker" pays out the players and the "banker" is the casino. There does not appear to be any necessary implication in the wording of s 192E(1)(b) that the deception be practised on, or the financial advantage be obtained at the expense of, an entity which has legal personality. The word "person" is not used in s 192E(1)(b) which tells against any such

limitation: cf. s 21(1) of the *Interpretation Act 1987* (NSW). Moreover, there would not appear to be any utility in such a requirement, since the purpose of a criminal prosecution, unlike a civil action for recovery for damages for misleading or deceptive conduct, is not to provide restitution to the injured party. In a civil action, the injured party, being the entity which suffered loss as a result of the deception must, for that reason, be identified and be capable of bringing the action. In a criminal action, the entity deceived (in this case, the casino) is identified as part of the presentation of the Crown case. That there be a particular person identified is not, however, an *element* of the offence for the reasons given below.

Authorities referred to by the trial judge

30. It ought be noted at the outset that his Honour accepted that there were some cases where deception of an entity could be proved by inference. However, for reasons that are not entirely clear, his Honour did not consider the present to be such a case. As the reasons indicate, his Honour's conclusion as to what was required was not the product of a process of statutory interpretation or by reasoning from fundamental principle. Rather, his Honour considered himself to be compelled by authority to the conclusion that he ought direct an acquittal of the respondents.

31. Accordingly, it is necessary to address the authorities which his Honour considered compelled that conclusion to ascertain whether his Honour was correct: *Duncan*; *Moore*; *R v Rozeik* [1996] 1 WLR 159 (*Rozeik*); *R v Jenkins* (2002) 6 VR 81; [2002] VSCA 224 *(Jenkins*); *Flack v R* [2011] NSWCCA 167 (*Flack*); *R v Clarkson* [1987] VR 962 *(Clarkson*); and *Reg. v Lambie* [1982] AC 449 (*Lambie*). His Honour also referred to additional decisions relied upon by the Crown, including *National Commercial Banking Corporation of Australia Limited v Batty* (1986) 160 CLR 251; [1986] HCA 21 (*Batty*). However, his Honour was not persuaded that these decisions affected his view that he was compelled by authority to direct an acquittal of the respondents. These cases will also be addressed.

Duncan

32. The appeal in *Duncan* arose from the investigation conducted by the Independent Commission Against Corruption (ICAC) into the granting of a coal licence over the Mount Penny tenement. At the conclusion of its investigation, ICAC made findings of "corrupt conduct" against the appellants within the meaning of the term as defined in the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act*). These findings related to the steps which the appellants had taken to sell their shares in Cascade Coal to a public company, White Energy Co Ltd (White Energy). As the appellants were all (indirectly) shareholders and directors of Cascade and directors of White Energy, the Australian Stock Exchange was notified and an Independent Board Committee (IBC) was set up to assess the proposal on behalf of White Energy and its shareholders. ICAC found that the appellants' failure to reveal information to the IBC was intended to deceive relevant public officials or authorities of the NSW Government as to the involvement of Mr Obeid and his family in the Mount Penny tenement.

33. The appellants challenged ICAC's findings in proceedings for judicial review. The trial judge upheld the findings against the appellants, who sought and were granted leave to appeal. The Court of Appeal unanimously dismissed the appeals brought by several of the appellants (including Mr Duncan) and, by majority (Bathurst CJ dissenting), dismissed the balance of the appeals.

34. One of the findings made by ICAC was that if certain facts were found and proved beyond reasonable doubt, it would be open to "the tribunal" (relevantly, a court, summarily or after trial by jury) to find that Mr Duncan committed a criminal offence of obtaining a financial advantage by deception contrary to s 192E(1)(b). The advantage was said to be the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

35. At [24]-[26] of his reasons, the trial judge referred to the statements of Bathurst CJ in *Duncan* (and Beazley P's agreement with what the Chief Justice said at [350]-[355], at [502]). Bathurst CJ said:

"[352] It is well-established that the financial advantage must be obtained by the deception. In Ho and Szeto v R (1989) 39 A Crim R 145, the Court stated that what must be established is a causal connection between deception and the obtaining of the money, the deception must be the means by which the money was obtained or the effective cause of it being obtained: at 147; see also Clarkson v R [1987] VR 962 at 980; Flack v R [2011] NSWCCA 167 at [37]-[38]; R v Clucas [1949] 2 KB 226 at 229-230.

[353] It is implicit in the need to establish the necessary causal connection that the person or entity deceived be identified: Director of Public Prosecutions v Ray [1974] AC 370 at 384. That is consistent with the well-known description of deception given by Buckley J in Re London and Globe Finance Corporation Limited [1903] 1 Ch 728 at 732:

'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false.'

. . .

[355] In R v Jenkins [2002] VSCA 224; 6 VR 81, Charles JA pointed out that an element of the charge of obtaining financial advantage by deception was that the person obtained financial advantage by such deception which in turn required it to be established that such deception operated on the mind of the person deceived: at [74]. To establish that, it is of course necessary to identify the person or entity deceived."

36. Bathurst CJ concluded at [360] that "there is no evidence that the transaction caused [the] erroneous belief [that the Obeids never had any interest in the tenement] to be held by any government official" and upheld the appeals of two of the appellants on that basis. Beazley P agreed. However, Bathurst CJ upheld some of the remaining appeals on the basis that no financial advantage arose from the conduct said to be deceptive because any benefit from the concealment had not yet crystallised. The majority (Beazley P and Basten JA) disagreed.

37. Beazley P considered that retention of financial value may be temporary and may constitute a financial advantage. Basten JA considered that maintaining the unrealised value of an asset constituted obtaining a financial advantage. Moreover, Beazley P took a broader view of what was required to prove deception and said, at [503]-[505]:

"[503] It remains to consider whether the primary judge erred in respect of the deception found by the ICAC to have been practiced on Mr Cubbin [a board member of IBC], in the case of Mr Duncan, and on the IBC, in the case of Mr Poole.

[504] In this regard, there are two matters that should borne in mind. **First, in identifying deception, it is always necessary to identify both the conduct said to be deceptive and the object of the deception said to have been practiced. Where a deception is said to have been practised upon a corporation or government entity, or a corporation or government entity via one of its officers, the conceptualisation of deception in terms of states of mind may be inapt. There is much to be said for the view expressed by Ormiston JA in *R v Jenkins* (2002) 6 VR 81 at [70] that, where the financial advantage is obtained from a corporation, the fact that the relevant officer was not, or does not consider themselves to have been, actually deceived cannot exculpate the person said to have practiced the deceit.**

[505] Secondly, it is imperative to look at the circumstances as a whole. Too narrow a focus on the ultimate knowledge of the person deceived, or their final conclusions at some particular point in time is apt to lead into error."

[Emphasis added.]

38. Basten JA said, at [647] that, as a matter of statutory construction:

"[T]he definition of "deception" in s 192B (except in respect of an electronic response) does not require that the deception have the effect of inducing a false belief in the recipient of information. The relevant effect is prescribed by the third element of the offence, namely obtaining (relevantly) any financial advantage."

39. The analysis of *Duncan* set out above does not support the requirement imposed on the Crown by the trial judge: that it was obliged to identify a human mind which was "deceived" and call evidence from that person or persons to the effect that he, she or they were deceived. Indeed Beazley P's reference to *Jenkins* and Basten JA's opinion as to what was *not* required would appear to support the proposition that the Crown could prove its case without adducing evidence from any individual person who was actually deceived.

Moore

40. In *Moore*, the appellant had a bank account which, in terms, allowed unlimited withdrawals on request. Notwithstanding that the balance of the appellant's bank account was, at all material times, negative, the bank continued to meet his requests for withdrawals. The appellant had neither the intention nor the capacity to repay the money to the bank. This Court set aside the appellant's convictions for obtaining money by deception on the basis that there had been no relevant deception. Leeming JA found, at [24], that there was no evidence that the appellant made any representation to the bank that caused it to lend him money. Fagan J said, at [52], that the charge under s 192E could only have been left to the jury if there was at least some evidence of each of the following:

"(1) a representation upon some matter was made, either expressly or by implication, by the appellant to the Bank (or to some relevant third party, the misleading of whom could result in the Bank being induced indirectly . . .);

(2) the representation was untrue;

(3) the appellant knew the representation to be untrue (or he knew there was a substantial risk it was untrue but proceeded to convey it with indifference as to its truth or falsehood. . .);

(4) the deception constituted by the making of the false representation caused the Bank to confer some financial advantage on the appellant or to incur some financial disadvantage to itself . . ."

[Citations omitted.]

41. I understand Fagan J's list to be referable to the facts of that case and not to require, as an element of every offence under s 192E, that there be a representation. At [61] N Adams J instanced the example of an employee of a bank entering false details into a bank computer to create an overdraft account when such account had not been approved. Her Honour considered that such conduct would amount to a deception even though no actual person had been deceived.

42. I do not discern from Fagan J's statement of the elements of the offence in *Moore* that deception can only arise by the making of a representation. Rather, I consider that his Honour was merely saying that the Crown was obliged to formulate a representation to establish the element of deception in the circumstances of that case.

Rozeik

43. In *Rozeik*, the appellant was convicted of obtaining cheques by deception contrary to s 15(1) of the *Theft Act 1968* (UK). His convictions were set aside on the basis that the managers of the two financial institutions alleged to have been deceived were regarded as having known of the falsity of the descriptions the appellant had given of the security. The knowledge of the managers, who were not shown to be parties to the fraud, was imputed to the financial institutions. Thus, although the Crown called persons from the

financial institutions who were deceived, the Court of Appeal held that this was not sufficient to overcome the imputation of the financial manager's knowledge of the falsity to the institution which had, therefore, not been deceived since it was taken to have known of the falsity.

44. Whitford DCJ placed particular reliance on the following passage from *Rozeik*:

"There were, therefore, two reasons why the judge's direction was wrong that it was sufficient that any employee of the company was deceived who was concerned in the provision of each cheque. First, the question is not whether any employee of the company was deceived, but whether any employee whose state of mind stood as that of the company knew of the falsity of the transaction, since if he or she did know, the company also knew. If the company knew, it would not matter how many fellow employees were personally deceived. Secondly, and in any event, a cheque could only be obtained from the company from an employee who had authority to provide it. The deception had to operate on the mind of the employee from whom the cheque was obtained. In no sense could a cheque be 'obtained' from the person who merely typed it out. So the judge's references to 'any' employee were fatally wide. What the Crown had to prove was that when the cheque was obtained from the company it was obtained from a person who was deceived."

45. The difficulty for the prosecutor in *Rozeik* was that the persons who had authority to approve the cheque on behalf of the financial institutions (as distinct from the persons who typed the cheques) were the persons who knew the truth and therefore were not deceived. They were not, however, party to the deception and therefore their knowledge *was* imputed to the financial institution.

46. *Rozeik* would not appear to be of relevance in the present case since there was no suggestion that the knowledge of the dealer (SKL) of the deception could be attributed to the casino since the dealer was, on the Crown case, party to the deception. Nor was there any reasonable prospect that anyone associated with the casino could have known of the respondents' cheating and *not* been party to it. As the evidence of Mr Houlihan summarised above indicated, it was a principal task of the supervisors to be on the look-out for cheating and to stop a game or notify their superiors as soon as they saw anything untoward. The trial judge's reasons indicate that his Honour considered that *Rozeik* established a requirement for evidence "of some other representative of the entity who was legitimately deceived on its behalf". Although this was held to be required in *Rozeik* because of the circumstances of the financial institutions' procedures for approving cheques, it does not follow that it constitutes a legal requirement in every case where an offence under s 192E is charged, or in the present case.

Jenkins

47. In *Jenkins*, the appellant had obtained loans and a guarantee from a friendly society, on the basis of valuations of land which was mortgaged to secure the loans and guarantee. The valuations overstated the value of the land. The appellant was convicted of furnishing false information for accounting purposes as well as on five counts of obtaining a financial advantage from the financial institution by deception contrary to s 82(1) of the *Crimes Act 1958* (Vic). No officer of the friendly society gave evidence that he or she was deceived by a valuation report into approving a loan application. By majority (Ormiston and Charles JJA, O'Bryan AJA dissenting), the convictions for furnishing false information were quashed on the basis that there was no evidence that the valuations had been required for accounting purposes. The Court unanimously dismissed the appeal against the convictions for obtaining a financial advantage by deception.

48. As noted by O'Bryan AJA at [139], in *Jenkins* the Crown made an express concession that, for there to be deception, a natural person must be deceived even though the victim is a body corporate. Although the Crown called the manager responsible for approving loan applications, Faithfull, who had approved the relevant loans, the Crown did not ask Faithfull why he approved the loans and whether he believed and relied on the contents of every valuation report referable to a loan application. O'Bryan AJA described the Crown's failure to ask these questions as a "curious omission". Nonetheless the Court was satisfied that there was sufficient evidence of a causal connection between the alleged deception and the obtaining of the

financial advantage to justify the conviction. Their Honours found that, in relation to all the transactions, the only inference that could reasonably be drawn was that the friendly society would not have allowed the loans to proceed had the true position been known and that, for each loan, the alleged deception was the only reasonably available operative inducement.

49. The statement of Charles JA, which was extracted by Bathurst CJ in *Duncan* and quoted (in that context) by the trial judge in the present case at [25], that it is necessary that the deception operate on the mind of the person deceived and, accordingly, necessary to identify the person or entity deceived, must be seen in the context of the facts of *Jenkins*. Faithfull's mind was, relevantly, the mind of the friendly society. He gave evidence that he approved the loans. Although he did not give evidence that he approved the loans because he believed that the valuations (which were in fact false) were true, the appeal against the convictions for obtaining property by deception were dismissed. While it may be accepted that the object of the deception must be identified, it does not follow that a particular individual need be identified, where the object of the deception is a particular entity rather than a natural person.

50. Moreover, I am not satisfied that the Crown's concession in *Jenkins* (that for there to be deception of a corporate entity, a natural person must be deceived) was correct. As the cases demonstrate, deception can be practised in many different ways. The mind of the entity cannot be equated with the minds of the persons by and through whom it acts: *Duncan* at [504] (Beazley P). See also *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24 at [28] (Gleeson CJ, Gummow and Hayne JJ).

Flack

51. The Crown case at trial in *Flack* was that the applicant and his associate made false representations to financial institutions to obtain loans to purchase buses. The representations were that the buses (which were identified by engine and chassis numbers) actually existed. The Crown case was that the financial institutions would not have advanced the money had they known that the representations that the buses existed were false. Evidence of the usual practice of the financial institution was given by four employees of the financial institutions who each deposed that, had the financial institution been aware that no buses existed, the loan would not have been approved. The trial judge rejected the applicant's application for a verdict by direction. In the course of the judgment rejecting the no case submission, the trial judge said that where the deception was on an institution and not an individual, the actual person who approved the loan was not a necessary witness. The jury convicted the applicant of all five offences.

52. The applicant applied for leave to appeal on a single ground: that the judge had erred in finding that there was a case to answer. The applicant submitted that without evidence from the persons responsible for approving the loans, the Crown could not establish that the applicant's deceptions caused the loans. Further, the applicant submitted that, notwithstanding the legal identity of the entity responsible for the loan, the Crown still had to prove that a natural person was deceived.

53. This Court dismissed the appeal. Johnson J (McClellan CJ at CL and Hidden J agreeing) summarised the relevant principles as follows:

"[36] On a prosecution for an alleged offence under s 178BA [the predecessor to s 192E] *Crimes Act 1900*, it is not necessary for the Crown to establish that it was the person deceived who suffered the relevant loss: *R v Ho; R v Szeto* at 147.

[37] What must be established, however, is a causal connection between the deception used and the financial advantage obtained. The deception must have been the means whereby the financial advantage was obtained, or the effective cause of the financial advantage being obtained. It is an essential ingredient of an offence under s 178BA that the cause of the giving of the financial advantage was the deception used by the accused person: *R v Stanhope* (unreported, 10 September 1987, pp 6–8); *R v Clarkson* [1987] VR 962 at 980; *R v Ho; R v Szeto* at 147.

[38] The question whether the deception was an operative cause of the obtaining of financial advantage, falls to be answered as a question of fact by the members of the jury applying their common sense: *R v King* [1987] 1 QB 547 at 553."

54. This Court held, at [40], that it was not necessary for the actual person who approved the loans to give evidence. The written loan applications were in evidence and evidence capable of establishing the falsity of the representations had been tendered. The Court held that, in these circumstances, the inference was available that the representations caused the financial institutions to approve the loans, citing *Batty* (which is addressed below) as authority for the proposition that whether inducement ought be inferred is a question of fact, and therefore for the jury to determine: [41]-[44].

Clarkson

55. At [36] of his reasons, the trial judge referred to *Clarkson* at 980 in support of the proposition (for which his Honour also cited *Flack* and *Jenkins*) that, "[i]n the case of deceptions perpetrated upon an entity, in reality it is the entity's representatives, employees or agents who are deceived". In *Clarkson*, the charge on the amended indictment was as follows:

"That [Clarkson] at Melbourne in the said State on or about the 26th day of June 1980 by deception, namely by representing to [Reid] that he intended to discharge a debt owed by Australasian Merchant Finance Holdings Pty. Ltd. to Swan Real Estate did dishonestly obtain from [Bernaldsen] a cheque dated 26th June 1980 to the value of $10,000 with the intention to permanently deprive the said [Bernaldsen] of the said cheque."

56. The Crown case was that the deception had been practised on Reid to secure his signature to an authority which was then used to induce Bernaldsen to sign the cheque. Bernaldsen gave evidence that he would not have signed the cheque without the authority signed by Reid. The Full Court held that the Crown did not have to prove that the person deceived (Reid) was the person who suffered loss (Bernaldsen) and that what was required to be proved was that the cause of the giving of the financial advantage was the deception used by the accused person. In the present case, the trial judge considered there to be sufficient evidence to establish a causal connection between the respondents' dishonesty and obtaining the financial advantage. *Clarkson* does not support the trial judge's directed acquittal since it did not establish that it was necessary to show that a particular individual was deceived as that question did not arise.

Batty

57. In *Batty*, Mr Davis, one of two partners in an accountancy firm (the guilty partner) misappropriated cheques paid to a third party, deposited them into the firm's account and withdrew the proceeds for his own use. The third party successfully sued the bank for damages for conversion of the cheques. The bank's cross-claim against Mr Batty (the innocent partner) was dismissed at first instance. The bank's appeal was dismissed by the Court of Appeal and by the High Court. Brennan J in *Batty* analysed the transaction put in train by the deposit of the cheques by the guilty partner and said at 273:

"[The trial judge] found that Mr. Davis had been guilty of fraud, though there was no direct evidence that a Bank officer had been induced to collect the cheques or pay money in reliance on any representation that Mr. Davis had made. The absence of such evidence was not necessarily a bar to recovery, however, for inducement may be inferred from the doing of something after the making of a representation calculated to induce the doing of that thing: *Smith v. Chadwick*. Whether inducement should be inferred is a question of fact dependent on all the circumstances, not a question of law. Such an inference may be drawn in criminal as well as in civil cases, as the House of Lords held in *Reg. v. Lambie* (though I should wish to reserve consideration of that case for the future if other issues there discussed should arise). The representation on which the Bank relies — that the firm was duly authorized by Bushby to deposit the cheques to the credit of the trust account or that the firm was the true owner of the cheques — is said to have been made simply by Mr. Davis' depositing of the cheques. Yeldham J. found that the depositing of the cheques to the credit of the trust account amounted to fraudulent misrepresentation by Mr. Davis that he had the owner's authority to do so."

58. *Batty* is of assistance for two reasons: first, it is authority for the proposition that inducement (or causation) is a factual matter which may be proved either by direct evidence of reliance on a representation or it may be inferred from conduct (the doing of something after the making of a representation calculated to induce the doing of that thing); and, secondly, it confirms that there is no relevant difference between the criminal law and the civil law in this respect.

Lambie

59. In *Lambie*, the bank issued a credit card to the respondent with a credit limit of £200. She used the card for transactions which exceeded her credit limit. The bank required that the card be returned and, although the respondent agreed to return it on 7 December, she failed to do so. By 15 December she had incurred a total debt to the bank of £1,005.26. On that day the respondent selected goods which cost a total of £10.35 and handed the card to the manager of the shop, Mothercare. The manager, Miss Rounding, completed a voucher and the respondent left the shop premises with the goods. The respondent was charged with obtaining a pecuniary advantage by deception on 15 December when she used the card to buy £10.35 worth of goods. She was convicted; the conviction was quashed on appeal but reinstated by the House of Lords, which applied *R v Charles* [1977] AC 177 and approved *R v Sullivan* (1945) 30 Cr. App. R. 132 (*Sullivan*), which is addressed below.

60. Lord Roskill, who gave the judgment of the Court, said that the relevant representation made by the respondent arose from the presentation of the credit card and was to the effect that she had actual authority to make the contract with Mothercare on the bank's behalf and that the bank would honour the voucher on presentation. His Lordship said at 460:

"That being the representation to be implied from the respondent's actions and use of the credit card, the only remaining question is whether Miss Rounding was induced by that representation to complete the transaction and allow the respondent to take away the goods. My Lords, if she had been asked whether, had she known the respondent was acting dishonestly and, in truth, had no authority whatever from the bank to use the credit card in this way, she (Miss Rounding) would have completed the transaction, only one answer is possible – no.

. . .

[I]f conviction of offenders for offences against sections 15 or 16 [obtaining pecuniary advantage by deception] of the [Theft] Act of 1968 can only be obtained if the prosecution are able in each case to call the person upon whom the fraud was immediately perpetrated and to say that he or she positively remembered the particular transactions and, had the truth been known, would never have entered into that supposedly well-remembered transaction, the guilty would often escape conviction."

61. *Lambie* supports the proposition that it was not necessary for the Crown in the present case to call the supervisors, the bankers or the cashiers at the casino to say that they saw nothing untoward and, had they been aware that the respondents were cheating at baccarat, they would have intervened to stop SKL from dealing and XGL and JY from playing and not allocated chips to XGL and JY or cashed their chips on presentation. As the trial judge found (at [54]-[63]) there was, in the circumstances of the present case, an inference from the evidence, taken at its highest, that, the cheating by the respondents was the operative cause of the payments by the casino to the players following the winning bets set out in the charges on the indictment. It was not necessary for the Crown to establish that any particular human mind had been deceived. His Honour was in error to impose this requirement on the Crown.

What is required to prove deception

62. The cases indicate that deception for the purposes of the offence of obtaining money (or other financial advantage) by deception may be practised in several ways. The form of the deception influences the mode of its proof.

63. In the usual case, the deception takes the form of a misrepresentation. Usually, the fact that the deception operated on the mind of the persons deceived is proved by direct evidence since the person who was deceived is called to give evidence that the deception was the operative inducement: see *R v Laverty* (1970) 54 Cr. App. R 495. In such cases, the person is asked, for example, what the person (the deceiver) said, whether the person believed the deceiver (yes) and what the person did as a result of what the deceiver had said (part with money, or property). The falsity of the deceiver's misrepresentation must also be proved.

64. However, this is not a universal rule but rather a statement as to the usual mode of proof in the paradigm case. Where the facts are such that the alleged false pretence is the only reason which could be suggested as having been the operative inducement, the inducement need not be proved by direct evidence since the hypotheses consistent with innocence can also be excluded by circumstantial evidence.

65. This proposition was established no later than *Sullivan*: see the summary in Archbold, *Pleading Evidence and Practice in Criminal Cases* (39th ed, 1976) at [1531a]. In *Sullivan* the appellant had placed an advertisement for dartboards which said "Dartboards. Actual maker can now accept limited number of orders; selected elm; rustless steel wires; double-sided; guaranteed NDA [National Darts Association] specification; £1 carriage paid; state whether trebles, clock or fives. J Sullivan." Nine victuallers sent money orders to the appellant for dartboards. He did not supply any dartboards. There was evidence that the appellant had no materials out of which dartboards could be made and no premises suitable for the manufacture of dartboards. Although the nine victuallers were called to give evidence, none was asked what his reason was for parting with the money or what effect the advertisement had on his mind.

66. Humphreys J, who gave the judgment of the English Court of Criminal Appeal, which dismissed the appeal against the conviction for obtaining property by false pretences, said at 136:

"It is, we think, undoubtedly good law that the question of the inducement acting upon the mind of the person who may be described as the prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is, proved by the witness being asked some question which brings the answer: 'I believed that statement and that is why I parted with my money'; but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to have been defrauded parting with his money, and that is the false pretence, if it was a false pretence."

67. Referring to the facts of the particular case, Humphreys J said at 136-137:

"We are inclined to think this is one of the cases in which that rule applies, for all the nine persons named in the indictment were complete strangers to the appellant. They saw an advertisement, and it is quite plain that, having read the advertisement, they sat down at once and sent their £1 to the appellant. What conceivable reason could there be for parting with their money except the language of the advertisement, and the language of the advertisement begins with the words 'Actual maker'? We think, therefore, that there was evidence upon which the jury, upon a proper direction, could find that the defendant did represent himself as the actual maker of dartboards, and that it was the representation that he was an actual maker of dartboards who was in a position as the actual maker to send a dartboard in return for a pound that induced these persons to part with their money. Therefore, without saying for a moment that the best possible course was followed in this case in the examination of the witnesses, we are of opinion that there was evidence upon which a jury could find that the false pretence which was alleged was the inducement which operated on the minds of the persons who parted with their money."

68. Where the victim of the deception is a corporation, there may be a person who can be identified as the relevant human agent of the corporation who was deceived. However, there is no reason in principle to import a requirement into every case from the common mode of proof in the usual case. Even if individual human agents of the company were deceived, it is not necessary that, if called at all, they be asked about their thought processes (*Jenkins*) since the inference can be drawn without such evidence (as in *Sullivan*, *Lambie* and *Jenkins*).

69. The categories of case in which it is not necessary to call a person to prove that the mind of the operative person (in some cases, a company) was deceived include cases where the company was deceived because of the deception of one of its employees. However, it is not limited to such cases.

70. The question will always be: has the Crown proved that the deception was the reason the property was obtained? The element of causation is the relevant element. The trial judge was in error to require, as an additional element of the offence, that the deception operated on the mind of the person deceived. To require the intervening step to be proved is to treat the mode of proof of the usual case as a legal principle which applies to *all* offences under s 192E(1)(b).

71. Further, as the definition of deception in s 192B(1) indicates, the deception may be by words or conduct and, thus, there is no requirement that the deception be capable of being formulated as a misrepresentation, although it will commonly be. This is consistent with the position in civil cases where, in claims for damages for misleading or deceptive conduct under ss 52 and 82 of the former *Trade Practices Act 1974* (Cth) or ss 18 and 236 of the Australian Consumer Law (*Competition and Consumer Act 2010* (Cth), Sch 2), the conduct is often expressed as a representation, although it need not be. As Lockhart J (Burchett and Foster JJ agreeing) said *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 555:

"Misleading or deceptive conduct generally consists of representations, whether express or by silence; but it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation. The section is expressed briefly, indeed tersely, in plain and simple words which, if I may be forgiven for repeating them, say simply: 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. There is no need or warrant to search for other words to replace those used in the section itself. Dictionaries, one's own knowledge of the developing English language and ordinary experience are useful touchstones, but ultimately in each case it is necessary to examine the conduct, whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct. This will often, but not always, be the same question, as whether the conduct is likely to mislead or deceive."

72. The words of s 192E(1)(b) create the crime of dishonestly obtaining a financial advantage by deception. There is no requirement in the section that the deception be effected by a representation although it is generally possible for deception under s 192E(1)(b) to be framed as such, even where, as in the instant case, it would involve a degree of contrivance. In the instant case, the Crown case can be understood as involving the allegation that the respondents "misrepresented" to the casino that they were playing by the rules of baccarat when in fact they were not.

73. The civil law decisions are of also of assistance on the question of proof of causation. In such cases, it is well-established that reliance can either be proved by direct evidence or inferred from the circumstances for the purposes of establishing causation in claims for damages for fraudulent misrepresentation and misleading or deceptive conduct: *Gould v Vaggelas* (1985) 157 CLR 215 at 237-238 (Wilson J); [1985] 157 CLR 215; *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357 at [11] (Wilcox J) and [45]-[52] (Kiefel J) (not disturbed on appeal); and *Jones v Acfold Investments Pty Ltd* (1985) 6 FCR 512 at 521-523 (Sheppard, Morling and Spender JJ).

Conclusion

74. For the reasons given above, it was not necessary for the Crown to call individual persons who were involved as unwitting and innocent witnesses or innocent participants in the criminal conduct. That the alleged deception was the operative cause of the dishonest obtaining of property by deception was a matter of inference which could be proved other than by calling such persons to give evidence.

75. I am satisfied that the trial judge was in error in requiring the Crown to identify a natural person or persons who was or were deceived and in requiring such a person to be called to give evidence as to his or her

thought processes. It was neither necessary for the Crown to prove that the deception operated on the mind of a natural person nor that the Crown adduce evidence directly from natural persons to establish its case of deception. As his Honour's error was as to the elements of the offence it involved a question of law alone for the purposes of s 107(2) of the *Criminal (Appeal and Review) Act*.

76. As the trial judge accepted, the Crown had adduced evidence which, would, if taken at its highest establish that the respondents had dishonestly obtained money and that their deception was the operative cause of the money being obtained. This was sufficient for there to be a case to answer.

77. I regard the respondents' complaint that they did not appreciate the case they had to meet as without foundation. It was plain from the indictment and the Crown opening that the Crown alleged that the respondent players and the respondent dealer dishonestly obtained a total of over $3 million in payouts from the casino as a result of their deception in playing baccarat. It is difficult to understand how, in these circumstances, it took the respondents by surprise when the Crown submitted in opposing the application for verdicts by direction that it was the casino which was deceived. I regard the following submission made by the Crown when opposing the verdict by direction as consistent with the way it opened and conducted the case:

"The accused, by their conduct, deliberately misrepresented the actual state of affairs, such that the Casino was deceived into believing that the wager was conducted in accordance with the rules and as result of genuine lucky chance, when in fact the true position was that the wager resulted from the pre-arranged secret signals/communications that had been made."

78. For the reasons given above, it was not necessary for the Crown to identify particular individuals or classes of people associated with, or employed by, the casino who may have been deceived into believing (incorrectly) that the wagers referred to in the indictment were made in accordance with the rules and were not the result of cheating.

Discretion

79. The further questions to be addressed are whether this Court should quash the acquittal under s 107(5) of the *Crimes (Appeal and Review) Act* and, if so, whether it should order a new trial under s 107(6).

80. The respondents contended that their acquittals ought not be quashed and a new trial should not be ordered. They submitted that even if the Crown's legal submissions were accepted, the Crown case was not sufficiently cogent to warrant a new trial. They also relied on the consideration that the charges pending against them under s 87(1)(a) of the *Casino Control Act* were still outstanding.

81. They submitted that it would be unjust to require them to incur the costs of a new trial, in circumstances where the cost of the first trial, which they submitted was lengthy, had effectively been thrown away. They also contended that, if a new trial were ordered, they would run the risk that the Crown would remedy any deficiencies that the respondents had exposed in their submissions in this Crown appeal.

82. In the case of XGL, who is Chinese national, it was submitted that his liberty to return to China has been removed by the conditions of his bail which have been in place since he was charged on 27 July 2016. XGL also submitted he had suffered hardship as he has not been able to return home to manage the business which he owns and runs, notwithstanding that he was acquitted by direction on 19 September 2018, following a trial which commenced on 16 August 2018.

83. The Crown submitted that a new trial should be ordered, pointing to the fact that the charges involved serious fraud involving substantial sums of money. The Crown submitted that the circumstantial case against the respondents was a strong one.

84. In *R v PL* [2009] NSWCCA 256 Spigelman CJ, with whom the other members of the Court agreed, set out the following principles which apply to this Court's discretion to order a new trial:

"[88] In a passage frequently cited by Australian Courts, Black J said in *Green v United States,* 355 US 184 at 187-188 (1957):

'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'

[89] Accordingly, there are circumstances in which the courts will order a stay of a second prosecution. (See, e.g., *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610 at [116]-[118]).

[90] In my opinion, in the context of an appeal against an acquittal by directed verdict, this Court should exercise its discretion not to order a new trial if it is satisfied that a conviction would be overturned as unreasonable, or on any other basis which would not result in a new trial on a successful conviction appeal.

[91] Although, on the authority of *R v R*, the trial judge cannot direct a verdict on that basis, the principle of double jeopardy, notwithstanding its partial abrogation, remains a fundamental principle of our criminal law. It should be given effect in the manner I have indicated.

[92] The Crown relied, on the exercise of the discretion, on the principle that the Court should not constrain the prosecutorial discretion. In *Maxwell v The Queen* (1995-1996) 184 CLR 501, Dawson and McHugh JJ said at 512:

'Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial.'

[93] If this Court formed the opinion that an appeal from a new trial would be upheld, then that new trial would constitute a relevant abuse of process."

85. I am not persuaded that the Crown case is other than cogent or that any verdict of guilty returned against the respondents would be unreasonable. The basis for the respondents' challenge to the Crown case has failed for the reasons I have given above. No other proper basis has been raised as to why any verdicts of guilty would be unreasonable. Nor do I consider there to be any reasonable expectation that the Crown case will alter in any substantial way if this Court orders a re-trial. For the reasons given above, there would be little utility in the Crown's calling supervisors, cashiers or other staff members since they would be likely to say nothing more than that they did not recall the events and that, had they observed anything untoward, they would have stopped the game or notified a more senior person.

86. The prosecutor, in the exercise of the discretion as to charging, is entitled to charge more serious offences (under s 192E) and charge less serious offences as back-up charges (s 87(1)(a) of the *Casino Control Act*). That the alleged criminality of the respondents is said to be covered by s 87(1)(a) of the *Casino Control Act* is not a sufficient reason to prevent the Crown from proceeding on the more serious charges by refusing to order a re-trial. In any event, the back-up charges were contained on a certificate pursuant to s 166 of the *Criminal Procedure Act* and therefore the maximum penalty that could be imposed if the respondents were convicted of the back-up charges is limited to that which would have applied if the charges had been dealt with in the Local Court: s 168(3) of the *Criminal Procedure Act*. If the respondents were convicted of the back-up charges, the Court could not impose a sentence of imprisonment of more than 2 years for any one sequence and could not impose a total sentence of more than 5 years for the offences under s 87(1)(a) of the *Casino Control Act*: s 58(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This is to be contrasted with the maximum penalty for a single offence under s 192E of ten years' imprisonment.

87. While there is undoubted hardship to the respondents, and particularly XGL who cannot return home to China because of his bail conditions, the charges against the respondents under s 192E(1)(b) are serious. As referred to above, the sum of the amount alleged to have been dishonestly obtained by deception exceeds $3 million, which increases the gravity of the charges.

88. In all the circumstances, I am persuaded by the Crown that it is appropriate to quash the acquittals of the respondents and order a new trial.

Proposed orders

89. I propose the following orders:

    1. Appeal allowed.

    2. Quash the verdicts of acquittal.

    3. Order a new trial.

    4. List the matter for mention before the District Court on Friday 15 March 2019 at 9.30 am.

90. **BUTTON J**: I have had the substantial benefit of reading the judgment of Adamson J in draft. I respectfully agree with all that her Honour has written, including the orders proposed, save for the following.

91. I express no opinion about the proposition that a representation (whether explicit or implicit, by conduct, or by omission) is not an essential part of deception, for the purposes of the offence-creating provision.

92. That is because I have always understood the concept of deception in the context of serious property offences as being founded on the idea that, "[t]o deceive is… to induce a man [or woman] to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false… More tersely it may be put, that to deceive is by falsehood to induce a state of mind…": *In re London and Globe Finance Corporation Limited* [1903] 1 Ch 728 at 732 and 733 per Buckley J (proceedings in the Chancery Division, but with regard to a proposed criminal prosecution).

93. Because of that understanding, I find it very difficult to conceptualise "any deception" that does not include some kind of representation, however attenuated.

94. But in any event, in my opinion the topic need not be explored further in order to determine this appeal. That is because, to my mind, there is no question but that, in allegedly cheating in a game of chance; allegedly keeping that cheating secret; and allegedly receiving a payout from the opponent in that game (the Casino), the respondents could certainly be said to have been impliedly representing by their conduct that they were and had been playing that game in accordance with its rules.

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Amendments

17 May 2023 - Publication restriction removed – judgment republished

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